Editor's note: 81 I.D. 472

UNITED STATES

v.

KENNETH McCLARTY

IBLA 72-118 Decided August 29, 1974

Appeal from Contest No. OR-4435 (Wash.), the decision of the Administrative Law Judge Graydon E. Holt, recommending that the Snoqueen placer claim be declared null and void.

Recommended decision not adopted. Contest dismissed.

Mining Claims: Common Varieties of Minerals: Generally

Whether a deposit of building stone is a common variety and no longer locatable under the mining laws since the Act of July 23, 1955, or is still locatable as an uncommon

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variety, depends on whether it has a unique property giving it a special and distinct value.

Mining Claims: Common Varieties of Minerals: Generally--Mining Claims: Common Varieties of Minerals: Special Value--Mining Claims: Common Varieties of Minerals: Unique Property

To determine whether a deposit of building stone is a common or uncommon variety, there must be a comparison of the deposit with other deposits of similar stone in order to ascertain whether the deposit has a property giving it a distinct and special value. The value may be for some use to which ordinary varieties of building stone cannot be put, or it may be for uses to which ordinary varieties of building stone can be or are put; however, in the latter case, the deposit must have some distinct and special value for such use. Special and distinct value may be reflected by a higher market value in comparison with other stones, but higher market value is not the exclusive way of proving that the deposit has a distinct and special value. It is possible that

special economic value of the stone may be reflected by reduced costs or overhead so that the profit to the producer would be substantially more while the retail market price would remain competitive with other building stones.

Mining Claims: Common Varieties: Unique Property

"Heatherstone," a type of andesite possessing properties of natural fracturing and flat surface cross sectioning, is considered to be unique when no other stone from the market area is shown to have the same characteristics, and witnesses verify the fact that these particular characteristics are peculiar to Heatherstone.

Mining Claims: Common Varieties of Minerals: Unique Property--Mining Claims: Common Varieties of Minerals: Special Value

A building stone's unique properties of natural fracturing and flat surface cross sectioning which reduce the cost of extraction and installation of the stone impart a

special and distinct value to the stone through the generation of profits in excess of those which could be realized from a deposit of common building stone.

Materials Act--Mining Claims: Generally

One whose only interest derives from the fact that he is the holder of a special use permit issued under the Materials Act has only those rights described in the permit, and land covered by such permit is subject to location under the mining laws. The permittee acquires no rights under the mining laws by virtue of his permit and cannot apply for a patent to the land encompassed by his permit.

Rights-of-Way: Generally--Mining Claims: Lands Subject to--Mining Claims: Withdrawn Lands--Withdrawals and Reservations: Generally

Where a state agency holds a Forest Service free use permit to remove mineral materials from designated public land this

does not constitute a withdrawal or serve to segregate the land from appropriation under the mining laws, as does a material site right-of-way issued pursuant to the Federal-Aid Highway Act.

Rules of Practice: Government Contests -- Rules of Practice: Hearings

Where a contest complaint makes no charge which refers to a particular matter, and where the Administrative Law Judge states at the hearing that he will confine the proceedings to specific issues which do not include the matter in question, and where, in the course of the hearing, the Judge refused to receive evidence relating to that matter, it is error for the Judge to make a finding as to that matter and employ such finding as part of the rationale of his decision.

APPEARANCES: Donald H. Bond, Esq., Halverson, Applegate, McDonald, Bond, Grahn and Wiehl, Yakima, Washington, for appellant; Arno Reifenberg, Esq., Office of the General Counsel, U.S. Department

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of Agriculture, Portland, Oregon, for appellee; Carl B. Luckerath, Esq., Seattle, Washington, for Intervenor.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Kenneth McClarty has filed briefs in opposition to the recommended decision of the Administrative Law Judge 1/ dated September 23, 1971, in which the Judge recommended that McClarty's Snoqueen placer claim be declared null and void because the andesite 2/ found on the claim is a common variety of building stone and therefore not locatable after July 23, 1955, under the Act of July 23, 1955, 69 Stat. 367, 30 U.S.C. §§ 601-615 (1970).

John W. Pope submits a brief as Intervenor in this case. Pope appeared as an Intervenor in the hearing contending that at the time McClarty's claim was located he was in possession of a portion of the Snoqueen claim and actively engaged in the production and sale of the stone from the deposit under a special use permit issued by the Forest Service pursuant to the Materials Act of 1947, as amended, 30 U.S.C. §§ 701 et seq. (1970). Therefore,

1/ The change of title of the hearing officer from "hearing examiner" to "Administrative Law Judge" was effectuated pursuant to order of the Civil Service Commission, 37 F.R. 16787 (August 19, 1972).
2/ Andesite is a volcanic rock composed essentially of andesine and one or more mafic constituents. A Dictionary of Mining, Mineral and Related Terms, U.S. Department of the Interior (Paul W. Thrush, ed. 1968).

he contends that a finding that the stone is an uncommon variety must accrue to his benefit. The Judge reasoned that this contention could not be supported, because under law, either the stone is a common variety and Pope's permit is valid or it is an uncommon variety and McClarty's mining claim is valid. Insofar as the record reveals, Pope has never located a mining claim on the land at issue.

The Snoqueen placer claim, situated in the Snoqualmie National Forest, Yakima County, Washington, was located on August 1, 1960, for andesite, a building stone. This stone sells under the trade name Heatherstone and is used in both commercial and residential construction. It is used for veneer walls, patios, fireplaces, planters and other purposes.

Common varieties of stone have not been locatable under the mining laws since the enactment of the Act of July 23, 1955, supra. 30 U.S.C. § 611 (1970) provides:

> No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: Provided, however, That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. "Common varieties" as used in sections 601, 603, and 611 to 615 of this title does not include deposits of such materials which are valuable because the deposit has

> some property giving it distinct and special value and does not include so-called "block pumice" which occurs in nature in pieces having one dimension of two inches or more. * * *

The enactment of 30 U.S.C. § 611 affected only common varieties but left the Act of August 4, 1892, 27 Stat. 348, 30 U.S.C. § 161 (1970), entirely effective as to building stone that has some property giving it distinct and special value. See United States v. Coleman, 390 U.S. 599 (1968). The pertinent part of this Act provides: "Any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims." Therefore, in order for Heatherstone to be locatable under the Act of August 4, 1892, appellant must prove that the stone from the Snoqueen claim is valuable because the deposit has some uncommon property giving it such distinct and special value as to distinguish it from the so-called common varieties.

Departmental action against the claim was initiated on April 5, 1961, when the Forest Service, Department of Agriculture, recommended the filing of a complaint alleging that the andesite on McClarty's claim was a common variety and therefore not subject to location. Subsequent to a hearing on the validity of the claim, the Hearing Examiner rendered a decision on March 22, 1962, declaring the mining

claim null and void. McClarty appealed to the Director, Bureau of Land Management, and his decision of September 24, 1962, vacated the decision of the Examiner and dismissed the contest. The Forest Service appealed to the Secretary of the Interior, whose decision reversed the Director's decision and remanded the case for reinstatement of the decision of the Examiner. United States v. McClarty, 71 I.D. 331 (1964).

On August 24, 1965, McClarty sought judicial review of the Secretary's decision in the United States District Court for the Eastern District of Washington. On May 26, 1966, the Court entered a judgment in favor of the defendant. (Kenneth McClarty v. Stewart L. Udall, Civil Action No. 2116, E.D. Wash.) McClarty appealed, and the United States Court of Appeals reversed the summary decision of the District Court and remanded the case to that Court with instructions to enter a judgment remanding the case to the Secretary of the Interior. Kenneth McClarty v. Secretary of the Interior, 408 F.2d 907 (9th Cir. 1969). The Court's decision also suggested that the Secretary vacate the decision of the former Secretary and that the Department conduct further proceedings consistent with the decision of the Court of Appeals. In this decision, at p. 909, the Court found that the Snoqueen deposit was unique because of the naturally fractured regularly shaped stone, but that evidence was sketchy as to whether it had a higher monetary value than other stones. The Court said that

the Department might properly conclude that the case should be remanded for hearing for further evidence on the issue of money value.

In United States v. McClarty, 76 I.D. 193 (1969), the Assistant Solicitor vacated the earlier Departmental decision and ordered a rehearing in compliance with the Court's opinion. At this rehearing on November 12, 1970, the Administrative Law Judge confined the issue to whether there was a discovery of a locatable mineral. On September 23, 1971, he issued his recommended decision in which he recommended that Heatherstone be found to be a common variety not subject to location after July 23, 1955, and that the Snoqueen placer claim be declared null and void.

The Judge found that although Heatherstone has a unique fracturing characteristic, this characteristic does not give the deposit a distinct and special value either in place or in the market place. He based this finding in part on evidence presented at the hearing that the Forest Service sold Heatherstone to Mr. Pope, the Intervenor, for 50 cents a ton in place. The parties stipulated that Heatherstone sells for $ 74 to $ 82 per ton on the dealers' lots. (Tr. 75-76.) 3/ Other stones on the dealers' lots sell from $ 40 per ton to $ 100 per ton. (Tr. 76-79.) In some cases, the selling price

3/ Transcript references in this decision are cites to the transcript of the hearing of November 12, 1970.

of the stone includes the price of cutting. (See Tr. 30, 72-73, 107-108.) The Judge stated that the real difference in value of one stone over another is not the selling price, but rather the volume of material being sold. The Judge found that the availability of competing sources of stone is so great that competition keeps the retail price within the reasonable range. He also decided that the in-place value of these materials is insignificant.

Regarding the Intervenor's position, the Judge found that if the stone is uncommon now, it always has been, and its sale by the Forest Service was not authorized under the Materials Act of 1947, 30 U.S.C. § 601 (1970). If the stone is a common variety now, it always has been and can be acquired only under the Materials Act. Thus, he concluded, either the mining claim is valid or the special use permit is valid.

Finally, the Judge held that the land was not subject to location by McClarty because of the segregative effect of a special use permit issued by the Forest Service to the State Highway Department. 4/

4/ At the hearing the Forest Service claimed that a portion of the Snoqueen was within the boundaries of a material site previously granted to the Highway Department of the State of Washington by a special use permit and that any portion of the Snoqueen within the site must be declared void ab initio.

On appeal, McClarty submits that the contest by the Forest Service should be dismissed and his claim upheld as a valid mining claim located on a deposit of building stone of uncommon variety. Appellant makes the following contentions in his brief:

> (1) The recommended decision of the Hearing Examiner is erroneous in finding that the Snoqueen placer mining claim is a deposit of a common variety building stone and the material thereon (known as Heatherstone) is a common variety of building stone. The test of whether the admittedly unique properties of the Snoqueen deposit give it a special and distinct value as a source of building stone for veneer walls, fireplaces, chimneys, etc. was improperly and unfairly restricted.
>
> (2) The recommended decision of the Hearing Examiner is erroneous as a matter of law in holding that grant of a special use permit to the Washington State Highway Department withdrew the land covered by that permit from location under the mining laws. The issue of withdrawal by virtue of the grant of a special use permit to the Washington State Highway Department was not within the issues litigated at the time of hearing, November 12, 1970.

The Forest Service alleges in its reply brief that the Snoqueen deposit's uniqueness is not supported by its price. It also reasserts its contention that a special use permit issued to the Washington State Highway Department withdrew the land covered by the permit from location under the mining laws.

Intervenor contends that the stone is an uncommon variety and that McClarty usurped his rights by locating his claim on the land in question.

The main issue for determination by this Board is whether Heatherstone possesses unique properties giving it a special and distinct value, thereby making it locatable under the Act of August 4, 1892.

According to the evidence in this case, the most unusual and notable characteristics of Heatherstone are its natural fracturing and flat surface cross sectioning. Appellant contends that these characteristics are unique and impart to Heatherstone a special and distinct value. In order to determine whether this contention is valid, it is necessary to study these properties and the alleged advantages inherent in them.

1. Advantages in Extracting and Processing Heatherstone.

Mr. Lehman, who is under contractual agreement with McClarty to extract Heatherstone from the Snoqueen deposit, testified at the rehearing regarding the extraction process. He stated that the natural fracturing affects the ease and expense of extracting the stone from the deposit. A gandy dancer bar is used to strike the seam and pry the pieces apart. No blasting is employed and little sorting is necessary. Most of the extracted stone is suitable to be palletized and shipped without further processing. The cleavage makes the material easy to palletize because it is dimensional, and the bed surface of the stone facilitates stacking. No sorting is necessary by the

dealers. The material is ready for sale the way it is palletized. Lehman explained that Heatherstone's natural attributes give it an advantage over manufactured or processed stones, saying:

> It has a special value over the fact that even manufactured or processed stone, as the Wilkinson stone and the sandstone, the Wilkinson building stone has to be guillotined and sawed, as does the Mount Adams, it has to be guillotined. But it has a much superior built-in characteristic as we do nothing to it. We do nothing but box a product that's ready for the wall. (Tr. 107.)

Lehman estimated that 70 to 80 percent of the stone in the deposit has cleavage which produces long bars of the material. There are also areas with wider slabs which easily fracture into bars. Lehman said that if it were not for the fracturing characteristic of the material, he would not be mining it. The fracturing is what gives the material its value. (Tr. 85-90.)

Lehman estimated the cost of extracting Heatherstone to be $ 5 per ton: $ 3 is allotted to labor, $ 1 to Caterpillar operation and depreciation, and $ 1 for the foreman. The packaging of the material totals $ 3.60 and includes $ 1.60 per ton for palletizing the material, $ 1 for loader expense and $ 1 for the operator. Extraction expense ($ 5) plus packaging expense ($ 3.60) is under $ 10. Lehman said that the fracturing characteristic of Heatherstone allows the operation

to be accomplished with minimum labor costs. Transportation costs range from $ 10 to $ 14 per ton within a radius of approximately 150 miles. (Tr. 88-89.)

2. Advantages in Installing Heatherstone. Walter Hupp, Raymond Meyers and Chester Dunn, masonry contractors experienced in using Heatherstone, 5/ testified to the advantages in installing Heatherstone. Raymond Meyers testified that Heatherstone has a clear advantage in ease of handling over other types of stone. (Tr. 68.) The three contractors testified that Heatherstone is easy to handle because of the flat beds, running opposite each other. Dunn explained that it is easier to lay because there are more ledges and flat areas on which to spread mortar. The shape of the cross section allows better adherence of the stone to the wall. Consequently, the stone will not "kick out" (fall out) of the wall. (D.-6.) 6/ Basalt, in comparison, is more difficult to handle because it is diamond shaped. The cross section of basalt might be two inches on one side and one inch on the reverse side, thus making it difficult to set one stone upon another. (Tr. 58, 59.)

5/ Hupp has used about 800 to 1,000 tons of Heatherstone over an eight year period. Meyers has used about 500 tons of Heatherstone for about two years. Dunn has used about 500 tons over an eight year period.
6/ "D" refers to the deposition of Chester Dunn taken on November 20, 1970.

Meyers and Hupp both testified to the fact that slabs of Heatherstone can be easily broken into bars simply by hitting the slab with a hammer. According to Meyers, it is possible to split a slab into two large pieces because of the fracturing characteristic of Heatherstone. (Tr. 65-66.) Basalt, on the other hand, shatters. Meyers claimed that it is easier to split Heatherstone with a hammer than to split any other volcanic rock. (Tr. 64-65.) Hupp explained that the slabs could be turned up on edge and still have the advantage of the flat beds. (Tr. 42.)

The contractors also offered testimony that better and faster coverage could be achieved by installing Heatherstone rather than some other type of volcanic stone. Better and faster coverage results in more economic installation. The characteristic flat beds of Heatherstone enable it to be used at labor-saving costs, since it can be installed faster. The process is faster because, after laying one stone, there is a good flat surface on which to lay the next. (Tr. 62-63.) Little fitting is necessary. A customer, therefore, might prefer Heatherstone because it can be installed at a more reasonable cost. (Tr. 53.) Dunn estimated that the cost of installing Heatherstone is $ 3.50 to $ 3.75 per square foot, while the cost of installing other volcanic stones runs between $ 4 and $ 5 per square foot. (D. 5-6.) On cross-examination, Meyers was asked about other stones including Wilkinson

stone, Arizona sandstone, Sierra Sunset stone, Oregon rainbow, LaGrande, and Featherstone, and he replied that of all the stones that he had used in the past ten years, Heatherstone is the most economical to put up. (Tr. 68, 69.)

As for coverage, Meyers estimated that one man could put up 100 square feet of Heatherstone in the same amount of time as another could install 75 square feet or less of basalt. (Tr. 66-67.) Dunn compared coverage of Heatherstone with coverage of other stones in the same amount of time. With ordinary volcanic building stone, Dunn estimated that the coverage would be about 50 to 75 square feet per ton per day for one worker, while the coverage with Heatherstone would average about 150 square feet per day for a worker. One man can put up 75 square feet of Travertine per day as compared with 150 square feet of Heatherstone. (D. 4, 5, 9.) About the same comparison is true between Glacier Green and Heatherstone, and Blue Ice and Heatherstone. There would be less coverage with Driftwood in the same amount of time. Coverage with sandstone would be slower because it is necessary to clip the ends accurately. Dunn said that Heatherstone can be put up faster than any stone that must be sawed and sized. (D. 8-10.)

Dunn referred to one of his building projects to illustrate the savings in labor by using Heatherstone: Dunn bid a job on a

Bavarian restaurant where the owner agreed to furnish Black Basalt at the owner's cost. Subsequently, Dunn decided to substitute Heatherstone for Black Basalt and pay for the Heatherstone himself. He still did the work for the price that he bid. His workers were able to lay twice as much Heatherstone as they would have been able to lay with ordinary volcanic stone in the same amount of time. (D. 3-5.) The time on this job was cut in half by using Heatherstone. Dunn saved 12 days of labor in order to "come out even." (D. 14-19.)

Regarding coverage per ton of the material, Dunn testified that one ton of Heatherstone will cover 65 to 70 square feet whereas one ton of rubble rock will cover only 50 square feet. There is better coverage with Heatherstone because volcanic rock is thicker than Heatherstone (five to seven inches as compared to three and one-half inches). (D. 28.) Hupp testified that it takes one and one-half times as much basalt as Heatherstone to do the same job. (Tr. 59.)

There was testimony to show that greater height could be reached on a wall in a working day with Heatherstone than with other stones. Dunn contended that there is no limit to how high you can go with Heatherstone because Heatherstone sets up better in the mortar and with the ledge effect the material is tied back to the wall. Because of

the good bed joints, it is not necessary to stop the job and wait for the mortar to dry. The higher you go on a wall, the more advantageous it is to use Heatherstone. With other types of rubble, you slow down production after you pass five feet. (D. 8.)

Lehman explained that low wastage, another advantage in using Heatherstone, is attributable to its fracturing. With Heatherstone, every stone can be used, unlike other materials where there is waste. (Tr. 87.)

McClarty has also attempted to show through the witnesses that the advantages of installing Heatherstone are not lost when the mason wishes to create an irregular jagged rough effect as opposed to a smooth, uniform effect. Hupp testified that the shape of the cross sections makes it easier to get an irregular effect with Heatherstone than with other stones. (Tr. 45.) Cost and labor advantages are the same when creating an irregular effect as when achieving a uniform effect. Meyers added that it was much easier to work irregular walls with Heatherstone than with other stone due to the cleavage joining characteristics. (Tr. 67-68.)

We now turn to a price comparison between Heatherstone and other stones. At the rehearing, there was a stipulation (Tr. 75-79) as to the following prices of stone:

	1957	1967	1968	1969
Wholesale price per ton				
Basalt $ 15			$ 20	
Heatherstone 45	$ 45	$ 54	54	
Camas	10	20		
Retail price per ton				
Selected basalt			50 to 54	
Heatherstone	65	82	74 to 82	
Camas	30	40		

The following is a comparison in retail prices between Heatherstone and competitive stones of different origin for 1969:

White Travertine $ 64 per ton
Other Travertine $ 58 " "
Glacier Green $ 77 " "
Renatta $ 72 " "
North Port $ 64 " "
Blue Ice $ 75 " "
Driftwood $ 66 " "
Ariz. Sandstone $ 70 " "

Appellant claims that the only stones in competition with Heatherstone in the market area are basalts, selected basalts and related stones, and Mount Adams stone. Mount Adams stone, at $ 75 is the highest price of this group. Since Heatherstone is priced between $ 70 and $ 82 per ton, Mount Adams stone merits a higher price in some instances. Although it may command a higher price than Heatherstone, Arthur Ritchie, a geologist for the State Highway Department, testifying on behalf of McClarty, explained that Mount Adams stone is not suitable in its natural state for veneer

for walls and similar uses as a building stone. It could be made suitable for walls but this would entail an extra step. By contrast, Heatherstone is suitable for such purposes in its natural state.

On the issue of uniqueness, the Forest Service offered evidence to show that andesite having the uniform fracturing characteristic is fairly prevalent in the Cascades. Raymond Shirley, a mining engineer employed by the Forest Service, testified that he had seen similar deposits to the deposit on the Snoqueen claim. Since the first hearing, two new deposits have been found in the vicinity: Mount Adams and Trillium Lake. The Mount Adams stone has essentially a vertical fracture and a uniform thickness throughout. Mount Adams stone comes in sheets rather than two by four bars 7/ like Heatherstone. Shirley admitted that the Mount Adams stone does not look like appellant's, but he said he offered it because of its comparable market value ($ 75 per ton). Trillium Lake stone has a two by four structure which is similar to Heatherstone but has not yet been developed to the point at which one could say it was equivalent to Heatherstone. (Tr. 28.) He could not say whether this deposit has a predominance of the cross section jointing. Shirley testified to the fact that the Trillium Lake deposit has not been opened up, and there was no quarry operation in process there at the time of the hearing. (Tr. 34-35) (Contestee's brief, p. 11.)

7/ Shirley apparently has reference to the respective dimensions of two adjacent sides of the stone "bar" produced; i.e. 2" x 4", as the description commonly applied to lumber dimensions.

Concerning the uniqueness of Heatherstone, Hupp testified that he did not know of any other lava or volcanic material used in the business that has Heatherstone's fracturing characteristics. (Tr. 44.) Meyers stated that Heatherstone's cross section makes it advantageous to use Heatherstone and that he was not aware of any other lava or volcanic building stone that characteristically has that kind of cross section. (Tr. 63-64.)

Having reviewed McClarty's contentions as to the distinct and special economic values attributable to the unique physical characteristics of Heatherstone, we must now consider whether the material is an uncommon variety and thus locatable under the mining laws.

In McClarty v. Secretary of Interior, supra, the Court of Appeals reviewed the criteria established by the Board in United States v. U.S. Minerals Development Corporation, 75 I.D. 127 (1968), for determining the difference between a common and uncommon variety of stone. These guidelines, as discussed at 908, are as follows:

> (1) there must be a comparison of the mineral deposit in question with other deposits of such minerals generally; (2) the mineral deposit in question must have a unique property; (3) the unique property must give the deposit a distinct and special value; (4) if the special value is for uses to which ordinary varieties of the mineral are put, the deposit must have some distinct and special value for such use;

> and (5) the distinct and special value must be reflected by the higher price which the material commands in the market place.

The Court of Appeals, however, in its review of this case, explained "value" by indicating that price cannot be the exclusive way of proving that a deposit has a distinct and special economic value attributable to the unique property of the deposit. The Court discussed other possibilities for determining value at 909:

> * * * [I]n the McClarty case, where the unique properties of the stone are the natural fracturing into regular shapes and forms suitable for laying without further fabrication, the distinct and special economic value of the stone may or may not be measurable by the retail market price in comparison with the price of other building stones. It is quite possible that the special economic value of the stone would be reflected by reduced costs or overhead so that the profit to the producer would be substantially more while the retail market price would remain competitive with other building stone. * * *

In applying these guidelines to the facts in the present case, the Court found the Snoqueen deposit to be unique. We agree. Our determination of uniqueness is based on the testimony of Hupp and Meyers that they did not know of any other stone having the same inherent properties as Heatherstone which enable it to be readily usable for construction. Raymond Shirley testified on behalf of the Forest Service that he had seen deposits similar to the deposits on the Snoqueen claim. He offered the Mount Adams deposit as an

example, but admitted that this deposit did not have the two by four fracturing characteristic of the Snoqueen. As for the Trillium Lake deposit, Shirley said that the claim had not "opened up" as of the date of the hearing. No other example of stone possessing the properties of natural fracturing and flat surface cross sections was offered into evidence.

We note that the Forest Service takes exception to McClarty's contention that the property is unique because this particular type of fracturing exists in an unusually large quantity on his deposit. We agree that quantity is not a unique property inherent in the deposit, but only an extrinsic factor. United States v. Stewart, 5 IBLA 39, 79 I.D. 27 (1972). Therefore, we recognize the fact that the Snoqueen deposit contains a large quantity of this stone, but our finding of uniqueness is not based on this point. Moreover, the issue of unique properties is not before us, having been decided by the Court of Appeals, which specifically held that the stone was unique.

The only facet of the guidelines enumerated in U. S. Minerals Development Corporation, supra, that remained unsettled was the question of value, and the Court therefore remanded the case to the Department for further evidence on this issue.

Since the U. S. Minerals Development Corporation decision, a number of cases have been decided which invalidated claims and reiterated the principle set forth in U. S. Minerals Development Corporation that a unique property imparts a special and distinct value by commanding a higher price on the market. Among these cases are Atchison, Topeka and Santa Fe Railway Company v. Cox, 4 IBLA 279 (1972); United States v. Lease, 6 IBLA 11, 79 I.D. 379 (1972); United States v. Rogers, A-31049 (March 3, 1970); United States v. DeZan, A-30515 (July 1, 1968).

Differences in the chemical composition or physical properties were held to be immaterial if they did not result in a distinct economic advantage of one material over another. United States v. Thomas, 1 IBLA 209, 78 I.D. 5 (1971); United States v. U. S. Minerals Development Corporation, supra; United States v. DeZan, supra.

Following this higher market value concept, in United States v. Chartrand, 11 IBLA 194, 80 I.D. 408 (1973), the Board reached the opposite result by holding a mining claim valid on the basis that the stone in question was an uncommon variety. In this case, appellant was able to demonstrate that his stone possessed a unique coloration characteristic which definitely translated itself into a higher market price when compared with other stones.

From the facts presented we find that while the price per ton of Heatherstone is not significantly higher than other stone used for the same purposes, its unique qualities do impart definite economic advantages over other competitive types of stone. Heatherstone is cheaper by half to quarry and prepare for market, resulting in significantly higher profits to the quarry operator. (Tr. 108.) It yields a greater volume of usable stone per ton and the same volume of usable Heatherstone covers a broader area, which means that fewer tons of Heatherstone are required for a given job, thereby effecting a significant saving to the builder. A mason can lay a substantially broader area of Heatherstone in a day's work, which affords a definite economic advantage to the masonry contractor. Where the wall exceeds five feet in height this advantage is further enhanced.

The finding that Heatherstone's unique properties impart special economic advantages does not hinge on the advantages in quarrying alone, but also on the economic advantages in installation that may be appreciated by the contractor, stonemason and customer.

The dissenting opinion questions whether a special and distinct value which accrues to the user of the stone is within the ambit of the Court's guidelines. Regardless of whether it is or is not, our finding of special value to the builder, contractor or subcontractor is not essential to the conclusion. There is an established special value to the producer, reflected by reduced costs

of overhead so that the producer's profit is substantially increased, and this is attributable to the uncommon physical properties of the stone. This, of itself, is sufficient to meet the Court's criterion for determining whether the stone has a special economic value.

We do not agree with the Administrative Law Judge's statement that volume of material sold rather than the selling price determines the real difference in value between the stones. The rule for determining whether a material used for the same purposes as common varieties of similar materials as set forth in United States v. U. S. Minerals Development Corporation, supra, was to determine whether it commanded a higher price than other such materials in the area. See also United States v. DeZan, supra, United States v. Rogers, supra. Comparison of materials on a "per unit" basis is inherent in this rule. If a comparison of the value of materials were not based on a "per unit" basis, then it might be said that coal could be considered more valuable than gold based upon the respective volumes produced and sold.

Disposition of the Intervenor's contention remains unresolved. In his brief submitted on appeal, Pope alleges that it is not possible to qualify a rock as having some property giving it distinct and special value, under the "Common Varieties Act," until it has been possible, in the open market place, to demonstrate both its

distinct features and its special value. Intervenor contends that until these have been demonstrated, it is premature to attempt to undertake a location, and while a prospector is in "pedis possessio" seeking to establish or create that identification, it is in violation of such prospector's possessory rights to permit usurpation by a stranger.

Pope's only demonstrated interest in the property in question was by virtue of a special use permit issued to him by the Forest Service under the Materials Act, supra. This statute, however, provides that the only material which may be sold under its authority is that which is not subject to disposal under other statutes, especially referring to "the United States Mining laws." § 601, supra. McClarty, locating a claim in accordance with the mining laws, was rightfully on the property.

Intervenor's contention that a location is premature until special and distinct value has been demonstrated in the market place is without merit. Demonstration of special and distinct value in the market place relates to proving whether or not a stone is an uncommon variety. If a stone possessing a unique property does therefore command a higher price in the market when compared with other stones, or enjoys some other special economic value based upon its unique quality, it is an uncommon variety and has probably

always been an uncommon variety. Therefore, it is locatable under the mining laws and is not the proper subject for a special use permit.

Applying the same reasoning, Pope's assertion that he was marketing the stone with the intention of proving it to be an uncommon variety cannot be sustained. A permit issued under the Materials Act may only be issued for common varieties of stone. Having been granted this permit, Pope cannot now assert that he is attempting to locate an uncommon variety of stone under the general mining law. Pope has not followed the procedures under the mining laws for locating a mining claim, and therefore he may not claim the benefits which these procedures afford. In addition, Pope's occupation of the land by reason of having applied for and accepted the permission of a federal agency is inconsistent with his contention that he was occupying the land under a right of possession and inchoate title.

Furthermore, we have limited jurisdiction in regard to adverse claims. 43 CFR 3871.3 provides that the question of right of possession to a mining claim between rival claimants is within the jurisdiction of the court. While perhaps not dispositive of the question, we observe that McClarty has procured an injunction from the Washington Superior Court for King County, Cause No. 583163, restraining Pope from access to the area.

We disagree with the Administrative Law Judge's finding that the alleged granting of a special use permit to the Washington State Highway Department circa 1950 withdrew the land covered by the permit from location under the mining laws. We note that this issue went beyond the scope of the issues to be considered in the hearing as delineated by the Administrative Law Judge, and as suggested by the Court of Appeals. Moreover, we note that the Contestant's brief in support of the Judge's recommended decision states, "the Hearing Examiner refused to receive evidence on the permit issue." The third charge in the Government's complaint of April 5, 1961, reads as follows:

> (c) A portion of the land embraced by this claim was on August 1, 1960 appropriated to other uses by the issuance of a special-use permit by the Forest Service. This portion of the land was therefore not locatable at the time this claim was located.

This charge does not specify a permittee. All briefs filed in the early years of proceedings discuss the permit issued to Pope on June 23, 1960, rather than the one allegedly issued to the State Highway Department. 43 CFR 4.450-4(a)(4) requires that the complaint contain a statement in clear and concise language of the facts constituting the grounds of the contest. It must give notice to the adverse party of the claims that are to be adjudicated so that he may prepare his case. United States v. Harold Ladd Pierce,

3 IBLA 29 (1971); Douds v. International Longshoremen's Ass'n., 241 F.2d 278, 283 (2d Cir. 1957). The charge in question is vague and even misleading, since there are two possible permittees, although the date of the permit referred to in the charge would seem to preclude any intention to invoke the permit issued ten years earlier. Such a charge is not proper notice to appellant on the State Highway permit issue and is therefore not a proper basis for decision. A ground not alleged in a contest complaint cannot be used to find a claim invalid, unless it has been raised at the hearing and the contestee has not objected. United States v. Northwest Mine and Milling, Inc., 11 IBLA 271 (1973); United States v. Harold Ladd Pierce, supra. We therefore conclude that it was error for the Judge to make a finding with respect to this issue and then to employ such finding as part of the rationale of his decision.

The Secretary of Agriculture is not expressly or impliedly authorized to withdraw unimproved national forest land from mining location. United States v. Crocker, 60 I.D. 285 (1949). See A. W. Schunk, 16 IBLA 191 (1974). General withdrawal authority is vested solely in the Secretary of the Interior by delegation of the power of the President. 43 U.S.C. §§ 141-142 (1970); Executive Order No. 10355, May 26, 1952; A. W. Schunk, supra. The Secretary of Agriculture, or any of his subordinates may not simply assume this authority without a similar delegation from the President. There have been cases, of course, in which there has been a proper withdrawal of land from

location under the mining laws by means other than an Executive Order or a Public Land Order. For example, a withdrawal may be made pursuant to a statute or regulation. J. M. Keeney, A-28856 (August 6, 1962); United States v. Schaub, 103 F. Supp. 873 (1952); Marion Q. Kaiser, 65 I.D. 485 (1958). In the absence of a formal withdrawal, the extent of an appropriation of lands by the Government for a valid federal use is determined by the extent of the improvements and actual use and occupancy of the land for such purposes. A. J. Katches, A-29079 (December 4, 1962) and cases cited therein; United States v. Schaub, supra, cf. United States v. Crocker, supra; Instructions, 44 L.D. 513 (1916), see also Right of Way--Forest Reserves--Jurisdiction, 33 L.D. 609 (1905).

Withdrawal by statute and appropriation by use and occupancy were both discussed in United States v. Schaub, supra, the case upon which the Administrative Law Judge relied in deciding that the alleged grant of a special use permit to the State Highway Department withdrew the land from location under the mining laws.

We find that the facts in Schaub must be distinguished from the facts in this case. There is no special use permit to the Highway Department in evidence in the record of this case. Neither was there evidence to show that improvements have been placed on the area in question, nor was there any proof that the material had been actually put to use by the Highway Department (although

the permit is said to have issued in 1950), nor did it prevent issuance of a special use permit to Pope in 1960 which expressly authorized Pope to mine rock from the same land covered by the permit which had been issued to the Highway Department. The Judge apparently was not of the opinion that the land was closed to mining location as a consequence of the special use permit given by the Forest Service to Pope, although he does not explain why one Forest Service permit should have a segregative effect on the land while another does not. Furthermore, we note that 48 U.S.C. § 341, now 16 U.S.C. § 497a (1970), under which the special use permit was issued in Schaub was peculiar to Alaska, and not applicable in the State of Washington. The Schaub decision also alludes to 23 U.S.C. § 317, which is the statute authorizing the granting of rights of way for materials sites for Federal-aid highway construction.

In any event, a special use permit issued to a governmental agency for the free use of material (unlike a material site right-of-way issued pursuant to the Federal-Aid Highway Act 8/) does not create a withdrawal of the land or serve to segregate the land from appropriation under the mining laws. VI BLM 4.6 states:

8/ Act of November 9, 1921; 42 Stat. 212, 216, 23 U.S.C. § 317. See Solicitor's Opinion, M-36554 (March 24, 1959); Sam D. Rawson, 61 I.D. 255 (1953).

GOVERNMENTAL UNITS

> A. Free-use permits may be issued to any Federal or State agency, unit, or subdivision, including municipalities without limitation as to the number of permits or value of materials upon a satisfactory showing that such materials will be used for public projects. Such permits will constitute a superior right as against any subsequent claim to or entry of the lands except that a permit does not segregate the land from location under the mining laws if the minerals in fact, are subject to location or the lands contain other locatable minerals subject to location (See section .2C). Permits to governmental agencies may be issued for such periods as are deemed appropriate, but may not exceed 10 years. (These permits are preferable to right-of-way material sites under section 17 of the Federal-Aid Highway Act). (Emphasis added.)

See also 43 CFR 2920.6 It follows that if issuance of such a permit by BLM does not segregate the public land involved from location of mining claims, the issuance of a similar permit by the Forest Service could not effect a withdrawal, absent some specific statutory authority 9/ or formal withdrawal action, which has not been shown in this case.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the recommended decision of the Administrative Law Judge is not adopted and the contest is dismissed.

Edward W. Stuebing
Administrative Judge

9/ For an example of Forest Service special use permits which have been given segregative effect by statute see the Act of February 14, 1931, 46 Stat. 1115.

I concur:

Douglas E. Henriques
Administrative Judge

ADMINISTRATIVE JUDGE THOMPSON DISSENTING:

Judge Holt's decision rested upon a finding that the stone deposit involved in this case is a common variety not subject to the mining laws. I agree with the majority to the extent of not accepting the Judge's recommended decision and of concluding that there is a deposit which should now be deemed an uncommon variety of stone within the meaning of the Surface Resources Act, 30 U.S.C. § 611 (1970), under the test set forth for this case in McClarty v. Secretary of the Interior, 408 F.2d 907, 909 (9th Cir. 1969), and based upon the present state of the evidence in the record. I do not, however, agree with certain other aspects of the majority's decision.

In reaching the conclusion that the deposit is an uncommon variety of stone, the majority greatly emphasizes testimony by stonemasons that Heatherstone is easier and more economical for them to install, implying that reduced costs for stonemasons is a legitimate factor in determining whether the stone has a special and distinct value. Although some language in the Court's opinion in McClarty may give such an impression, a more careful analysis of the decision compels the conclusion that such evidence would only be relevant to the market value of the product and, at most, to whether the quality of the stone would increase the demand for the stone at the quarry so that the producer of the stone at the

quarry would increase his profits. The Court in McClarty concluded that the stone deposit had a unique property in that it was naturally fractured into regular shapes ready for use by the stonemason with little, if any, cutting or shaping required. The Court also indicated that it would be proper for the Department to remand the case for further evidence on the issue of economic value to ascertain whether there was a special and distinct value, as had been done in United States v. U.S. Minerals Development Corp., 75 I.D. 127 (1968). To determine whether a deposit is an uncommon variety as defined by Congress to "include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value * * *," the Court made certain suggestions. First, it stated that one aspect of the test enunciated in the Minerals Development case, namely, a price comparison with other materials, "cannot be the exclusive way of proving that a deposit has a distinct and special economic value attributable to the unique property of the deposit." 408 F.2d 909.

Second, the Court suggested with respect to the McClarty claim:

> * * * where the unique properties of the stone are the natural fracturing into regular shapes and forms suitable for laying without further fabrication, the distinct and special economic value of the stone may or may not be measurable by the retail market price in comparison with the price of other building stones. It is quite possible that the special economic value of the stone would be reflected by reduced costs of overhead

> so that the profit to the producer would be substantially more while the retail market price would remain competitive with other building stone. * * * [Emphasis added.]

Id. The underlined portion of the quotation indicates another input into the equation of determining a distinct and special value as to the McClarty claim. Under this suggested test, the stone may have a price competitive with other building stone. However, it is essential to compare the economics of the claimant's quarrying operation with that of other stone producers' operations to ascertain whether the claimant is, in fact, making a greater profit for his stone than other stone producers for reasons attributable to the unique property of the deposit. The Court stressed it is not the fabricated product which should be compared but the nature of the deposit itself. The profitability to the producer of the stone from the deposit must, therefore, relate to the quarry owner or operator - the producer of the stone - not to the profitability of an artisan who uses the material in his work. To determine the profit to the producer we are not concerned with how much profit a mason who buys the stone can make in his work by using one stone over another except insofar as testimony by a mason would show a demand for the stone in the marketplace. Although a stonemason could be an operator of a quarry, usually the mason is several business transactions away from the producer. Often he is hired to lay stone after a builder or other consumer has already purchased the stone from a wholesaler - generally a dealer in stone

and other building products. The dealer in turn has purchased the material from a quarry operator or taken the material by consignment. It is possible that masons may buy directly from a quarry operator if they have a job where they may select the materials. If the stone has a special advantage to masons as consumers, this in turn should be reflected by a difference in the price they, as consumers, would pay for the product in comparison with other available stones, or would so increase the demand for the stone that the quarry operator might be able to operate more profitably because of reductions in his overhead and costs in relation to production from the quarry in comparison with other quarry operators.

I cannot attribute to the Court a ruling that we compare the economics of stonemasons - the artisans who use the material - but that we compare the economics of the producers of the stone. To the extent the majority indicates or implies that the testimony of the stonemasons has any relevance other than as showing the marketability of the stone and how that might affect the profitability of the producer, as I have indicated, I disagree.

Under the Court's suggested test that reduced overhead costs may give a producer a substantial profit over other producers, very difficult evidentiary problems are created. If a truly valid comparison of the profitability of producers is to be made, there should be evidence comparing the cost operations of many quarry

operators with evaluations and adjustments made to reflect cost and overhead differentials due to the unique property of the deposit and due to other factors unrelated to the unique property, such as differences in labor costs resulting from other economic and geographical factors and transportation costs from the quarry to the market. See United States v. Bedrock Mining Co., 1 IBLA 21 (1970), and cases cited therein. The Court's directions regarding this test control our application of the test to the question of common or uncommon variety in this case. Before extending this test to other cases, however, a more thorough consideration should be given to it not only because of the difficult evidentiary problems it creates both for the claimant and the United States but also to ascertain whether it is in accord with the intent of Congress, as reflected in the legislative history of the Surface Resources Act. 1/

1/ I note that the decision of the United States Circuit Court for the 9th Circuit overturning a lower court and a previous Department decision was rendered without any briefing by the United States on the question of the criteria for determining common or uncommon varieties of stone. Counsel for McClarty presented an extensive brief to the Court suggesting the test and raising other issues. The United States responded with a summary brief indicating that the case would be governed by the Supreme Court's ruling in United States v. Coleman, 390 U.S. 599 (1968), which was then pending. The Court delayed its decision until the Supreme Court's decision in Coleman issued. The Coleman decision did not go into the issue of what constitutes a common or uncommon variety of stone other than to refer to the language of the Surface Resources Act. Because the Government did not respond to McClarty's suggested test, the difficulties inherent in that test were not pointed out to the Court in writing and may explain some of the apparent difficulties in the Court's opinion.

The evidence in the record concerning a comparison of profitability in the operations of stone producers is meager. The only comparison of costs and overhead of the producers due to the unique property of the deposit was made by Burton A. Lehman who has an interest in the claim. He indicated that the Mount Adams stone, which a Government witness had testified was similar to the Heatherstone in the retail market place, costs $ 22 a ton to quarry, whereas the Heatherstone costs $ 5 to quarry. (II Tr. 108.) This is a rather substantial difference, assuming the difference is all attributable to the unique fracturing of the Heatherstone deposit. The parties also stipulated, as the majority has set out, to the retail and the wholesale prices of certain stones. Such evidence showed the price of Heatherstone to be comparable to that of certain other building stone in the retail market, presumably stone which is deemed a common variety though considerably less than

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(Fn. 1 Cont.)

This Department in another case has preferred not to follow the Court's test in McClarty on the ground it did not believe Congress intended that ordinary sand, gravel, and stone, etc., which is indistinguishable from other ordinary sand, gravel, stone, etc., should be subject to mineral location merely because a deposit of it can be mined more cheaply than other deposits. United States v. Chas. Pfizer & Co. Inc., 76 I.D. 331, 346 (1969). That position is in accord with an earlier decision where a deposit of sand and gravel could be sold at a lower overhead because expensive processing was unnecessary, but the Department ruled the deposit was a common variety. United States v. Henderson, 68 I.D. 26 (1961). I believe those rulings more truly reflect the intent of Congress than the Court's ruling in this case.

stone such as Georgia marble. It showed the Heatherstone commanded a significantly higher wholesale price than basalt, a common variety of building stone in the area. There is insufficient evidence in the present record to find under the Court's test in this case that the deposit is a common variety.

If the question of common or uncommon variety were the only question in this case I would dismiss the Government's complaint. There are, however, additional problems.

This case illustrates the dilemma for a prospective mining locator, a permittee or purchaser of materials, and the Departments of Agriculture and the Interior in deciding whether a given deposit of stone is a common variety which is subject to sale under the Materials Act of July 31, 1947, as amended by the Surface Resources Act of 1955, 30 U.S.C. §§ 601-04 (1970), or is an uncommon variety still locatable under the mining laws, 30 U.S.C. § 22 et seq. (1970), including building stone under the Act of August 4, 1892, 30 U.S.C. § 161 (1970).

At the first hearing in this case, Arthur Ritchie, a geologist for the State Highway Department, and a witness for the contestee, testified about the State's development of the area as a site for materials for highway construction. (I Tr. 129-133.) He did not

give exact dates but it is clear that this was prior to the location of McClarty's claim. At the second hearing John W. Pope was allowed to intervene. Offers of proof by Pope were rejected by the Administrative Law Judge after objections by counsel for contestee. These offers were to present proof that the mining claim boundaries did not encompass certain workings but that the claim did conflict with workings developed by Pope from 1950 through 1961 under use permits from the Forest Service. (II Tr. 15, 21, 22, 120-28.) Offers of proof by the contestant that the claim boundaries did not conflict with Pope's prior area of use but did conflict with the State's use area were also rejected. (II Tr. 20, 128.)

Part of the rationale of the Judge in rejecting Pope's offers of proof was based upon an understanding that such evidence could be submitted in a subsequent hearing relating to a private contest initiated by Pope against the McClarty claim. However, soon after this hearing, Pope's private contest complaint against McClarty and Burton A. Lehman was dismissed by a decision of the Oregon State Office, Bureau of Land Management, dated December 28, 1970, for failure of the contestant to show he was qualified to contest the claim as one claiming adverse title or interest in the land, and other procedural reasons. Pope has appealed from this decision. (IBLA docket no. 71-174.) It is evident that Pope's offer of proof does raise a question of where the boundaries of

McClarty's mining claim are in relation to the deposit that McClarty contends is an uncommon variety. This is a matter of sufficient importance that the validity of the claim should not be decided in this case until the question is resolved. Another problem concerns the effect of the prior permitted use and whether it conflicts with McClarty's claim.

I cannot agree with the majority's restrictive view of the scope of inquiry into questions relating to this mining claim apart from the issue of common or uncommon variety. This Department has recognized, upon a remand from a court for further evidentiary proceedings, that all evidence which relates to the validity of a claim may be considered. United States v. Estate of Alvis F. Denison, 76 I.D. 233 (1969). I see nothing in the Court's decision, including its statement remanding the case for further proceedings "not inconsistent" with its opinion which would preclude inquiry into essential matters affecting the validity of a claim. McClarty v. Secretary of the Interior, 408 F.2d 907, 910 (9th Cir. 1969). For instance, it has long been recognized that if land was not open to mining location when a mining claim was located a mining claim may be declared void ab initio without the necessity of a hearing. United States v. Consolidated Mines and Smelting Co., Ltd., 455 F.2d 432 (9th Cir. 1971); Dredge Corp. v. Penny, 362 F.2d 889 (9th Cir. 1966).

Surely nothing in these proceedings could restrict the authority and duty of the Department of the Interior to ascertain whether the claim was located on land open to mining location or indeed to ascertain whether the claim boundaries do include the allegedly uncommon varieties of stone deposits. Otherwise, mistakes and neglect of Governmental officials would confer rights contrary to the law. We are under an obligation to assure that this is not done. See, e.g., 43 CFR 1810.3. 2/

I also disagree with the majority's overly broad statement to the effect that if a stone is an uncommon variety it "has probably always been an uncommon variety" and thus disposable only under the mining laws. In any determination of the value of a mineral deposit there are variables which may compel that a given deposit is valuable at one time but may not be valuable at a different time. Thus, in applying the prudent man test of discovery, it has been recognized that changes in market demand or other economic circumstances may cause a discovery to be lost because of the change in value of the deposit. United States v. Estate of Alvis F. Denison, supra; Mulkern v. Hammitt, 326 F.2d 896 (9th Cir. 1964).

2/ In suits by the United States to protect a public right or interest, laches or neglect of duty on the part of a public official has not been a valid defense. Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917).

The concept of value is under even a sharper focus in applying the statutory test for determining whether a deposit of stone is an uncommon variety because of its "special and distinct value." Under the Court's test in this case it is apparent that the value to the producer could easily be affected by changes in the marketplace or by technology or other factors which might change the overhead. Could it then be said that the material remains an uncommon variety under the Court's test even though the producer would not retain his economic advantage? I do not think so.

Because a determination of "special and distinct value" necessarily compels a consideration of factors which might fluctuate in time so as to affect a determination made at different times, the dilemma for the quarry man and for the government administrator is enhanced. If a prudent person could not ascertain from existing facts whether a given deposit of stone has a distinct and special value, is it proper to imply, as does the majority, and as did the Administrative Law Judge, that the Government unlawfully issues a permit for sale or free use of such stone under the Materials Act? The majority strongly suggests that because the Materials Act does not authorize the sale of uncommon varieties of materials locatable under the mining laws, a permit issued for common varieties of materials cannot affect the status of the land in any way as to subsequently located mining claims. The majority reaches this conclusion as

to permits issued by the Forest Service by emphasizing that the Secretary of Agriculture is not the authorized officer to make withdrawals of land and by referring to a Bureau of Land Management Manual release pertaining to free use permits.

The correct focus of the problem in this case is not to be made by looking to the authority to make withdrawals of the public land or by looking to BLM Manual releases which do not have the effect of law. We are not concerned here with whether there has been a permanent withdrawal of the land barring mining claims, but what effect two different permits issued by the Forest Service may have had upon a subsequently located mining claim for the same land. To some extent raising this issue is premature because the Judge did not permit evidence regarding the permits to be introduced at the hearing. The majority recognizes that if the permit to the state for a material site were made under the Federal Aid Highway Act, 23 U.S.C. § 317 (1970), the land within that site would be segregated from appropriation under the mining laws while the permit is effective. See cases cited in majority opinion and Carl M. Shearer, A-30838 (December 21, 1967). If the permit in this case were in fact under that Act, I submit the majority's conclusion that it is too late to consider that fact without bringing a new contest because it was not specifically charged in the complaint is clearly erroneous. See my previous discussion of the authority of this Department to consider matters which would affect the validity of a claim.

If the state material site permit was a free use permit made under the Materials Act, as the testimony of Mr. Ritchie tends to indicate, (although we do not know as the permit is not in the record) is the state's right lost as the majority implies when the mining claim is located? The state has not been made a party in this proceeding. I suggest before this Board rules definitively upon the rights of the mining claimant as to lands which may be in conflict with the state's permit, that the state be invited to intervene and the facts concerning the permit be made of record. 3/

3/ A regulation of this Department, with regard to the effect of free use permits to governmental units under the Materials Act, provides in part:

> "* * * Such permits will constitute a superior right to remove the materials and will continue in full force and effect, in accordance with its terms and provisions, as against any subsequent claim to or entry of the lands."

43 CFR 3621.2. To the extent the BLM manual provision quoted by the majority conflicts with this regulation it is in error, as the manual release is merely an intra-Departmental instruction without the force and effect of law which a duly promulgated regulation has. This regulation at least reserves the right to remove the common variety mineral materials to the governmental permittee after subsequent claims or entries of the lands are made. I would suggest that to the extent this regulation promulgates a rule affecting mining claims, it may have applicability to similar permits issued by the Forest Service. See section 1, ch. 2 of the Forest Organic Act of June 4, 1897, 16 U.S.C. § 482 (1970). Note that the Materials Act, 30 U.S.C. § 601 (1970), authorizes the Secretary - of the Department of the Interior or Agriculture, as the case may be - to promulgate rules and regulations for the disposal of the materials. I am unaware of any specific regulation promulgated by the Secretary of Agriculture regarding the effect of its permits upon subsequently located mining claims. Cf. 36 CFR 251.12. But see Forest Service Manual § 2811.25 stating the Forest Service position that lands "occupied or used under a term special-use permit are withdrawn from location and entry."

I have previously indicated that Pope's offer of proof concerning the location of the boundary of the McClarty claim should have been permitted to assure that the particular deposit having the unique property is within the claim. I would also defer a final ruling upon the possible effect of Pope's permit upon the subsequently located claim until the record is complete in this matter.

I suggest that the majority's decision is also overly broad in its discussion of "special use permits" issued by the Forest Service. The question in this case should be limited to a permit or sale under the Materials Act. Although there has been some mislabeling and use of the term "special use permit" in these proceedings, this inartistic use of the term should not be used as a tool to forge rules broader than the actual facts. Generally the term should be limited to permits which are not made under specific statutory authority for specific uses. The Department of the Interior regulations designate "special use permits" for "special purposes not specifically provided for by existing law." 43 CFR 2920.0-2. Cf. 36 CFR 251.1(a)(1) relating to the Forest Service use of the term. Regulation 43 CFR 2920.0-2 cited by the majority has no applicability here as it pertains only to special use permits issued by the Department of the Interior, for a purpose not specifically provided by law, and not to sales - negotiated or by competitive bidding - or free use permits under the Materials Act.

It is possible that within a given area there may be deposits of common and uncommon varieties of material intermingled. If a sale or permit for an uncommon variety has been made before a mining claim is located embracing the area, I cannot see how a subsequent mining claim can terminate that contract as to the common variety minerals in the absence of specific regulatory or contractual provisions. 4/ The general rule of law that prior contracts prevail over subsequent contracts to another party should be applicable to successive governmental contracts or grants. Otherwise, there would be a failure of consideration upon the part of the Government and a breach of contract. 5/

4/ Note that regulation 43 CFR 3601.3 of this Department provides that subsequent appropriations of land covered by a materials sale contract, including mining locations, are subject to the outstanding contract of sale and the purchaser has the continuing right to remove the materials until termination of the contract.

5/ On this point the following discussion concerning other statutes is of interest:

"* * * Congress cannot be presumed to have authorized the granting of rights which shall be subject from the date of the grant to being defeated at any time by the provisions of a prior act, at least in the absence of a clear intent to do so. On the other hand, the issuance of an oil and gas lease pursuant to a direction of law binds the Secretary to an obligation of contract which cannot be avoided without proper cause. See United States v. Bank of the Metropolis, 14 U.S. (15 Pet. 377, 392) 114 (1841) and Perry v. United States, 294 U.S. 330, 352 (1935). It is believed that the 1920 [Mineral] Leasing Act was intended and did modify the 1914 Act to the extent necessary to maintain the obligation of contracts entered into under authority of that leasing act. It follows that a lease properly issued cannot be canceled merely to permit the issuance of an unrestricted patent to an entryman because of a subsequent change of classification of the land. Pace v. Carstarphen et al., 50 L.D. 369 (1924) is not the contrary [sic]. There an oil and gas permit was issued for land in an outstanding settlement claim at a time when the land was not withdrawn, classified, or valuable for oil and gas."

Acting Solicitor's Opinion, 61 I.D. 459, 461 (1954). See also 5A Corbin on Contracts, §§ 1169, 1170 (1964).

The problem is more complex and troublesome where we are concerned with the same deposit rather than intermingling deposits of common and uncommon varieties.

We must presume that when this Department or the Forest Service issues a permit or makes a sale under the Materials Act for a common variety of material it makes a determination that the deposit of material is, in fact, not an uncommon variety locatable under the mining laws. Cf. Diamond Coal Co. v. United States, 233 U.S. 236, 239 (1914). Where no mining claim has been located and the administering agency issues a permit or makes a sale because the facts known at the time do not establish that the deposit has a property giving it a special and distinct value, the permit or sale is lawful. If, subsequently, facts become established which tend to prove that a property in the deposit may give it a special and distinct value, that does not establish that the initial determination was unlawful or improper where the deposit did not then have a known special and distinct value. 6/

6/ See the quotation in n. 5, supra, and the following quotation:

"Land not known at the time to be mineral in character may be devoted to purposes recognized by law as proper in aid of the objects sought to be attained by establishment of forest reserves or coming within the purview of the appropriation acts for protection and administration of such reserves, and subsequent discovery of mineral therein will not affect its use for those purposes or render it liable to exploration, location, or entry under the mining laws. This is in accord with the general rule that the known character of land at the date of its sale controls and that the right and title of a purchaser from the United States can not be defeated or affected by subsequent discovery of mineral in the land (Deffeback v. Hawke,

Of course, upon a determination that the deposit is an uncommon variety, no new sales of the materials or permits for free use could thereafter be made as long as the deposit is deemed locatable under the mining laws. See 43 CFR 3601.1.

To conclude, I would remand this case for an additional hearing on the matters I have discussed which need further factual information. I would rule, at the very least, that a mining claim located after permits for free use or for materials sales are subject to those sales and permits so long as they are in effect. Pending a more complete factual determination and opportunity for all interested parties to present briefs, I would postpone ruling on the question of whether the existence of the permits temporarily segregates the land or constitutes such an appro-

(Fn. 6 Cont.)
115 U.S. 392, 404 [1885]; Aspen Consolidated Mining Co. v. Williams, 27 L.D. 1, 15-18 [1898]. This rule is equally applicable to appropriations of public land for public uses and its application is necessary to properly safeguard and protect public interests. The known character of land at the time of its appropriation for government use, in this case for use in protecting and administering forest reserves and accomplishing the objects sought by establishment of such reserves, is the criterion for determining its liability to such appropriation. Having been once properly devoted to such public use no change in its known character resulting from subsequent discovery of mineral therein can have any effect upon such appropriation or make the land subject to exploration, location or entry under the mining laws. [Emphasis added.]"
Opinion of the Assistant Attorney-General, approved by the Secretary of the Interior, 35 L.D. 262, 68 (1906). See also, Diamond Coal Co. v. United States, supra.

priation of the land that a mining claim located while they are in effect is void ab initio as to such land. Cf. Acting Solicitor's Opinion, M-36554 (March 24, 1959); Filtrol Co. v. Brittan & Echart, 51 L.D. 649 (1926).

Joan B. Thompson
Administrative Judge

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